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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 12

THE WESTERN PACIFIC RAILROAD, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

REPLY BRIEF FOR APPELLANTS

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The Brief for Appellants and the Brief for the United States have already answered most of the contentions made by appellees,[1] and therefore this Reply Brief will discuss only a few of appellees' major errors and the significance of their position.

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[1] For purposes of simplification, the term "appellees" will be used here to refer to both the railroad appellees and the ICC, unless otherwise indicated. The brief for the railroad appellees will be cited "RR App.—," and the brief for the ICC will be cited "ICC —."

The Court should note carefully the development of appellees' argument. They begin by asserting that § 3(4) was really intended by Congress to apply only to those lines which have a *direct physical connection* with the discriminating carrier. The railroad appellees say, for example, that § 3(4)'s predecessor, § 3(2), insured "that those lines which had a direct physical connection received the same treatment * * *" (RR App. 17-18); that § 3(2) "was intended for application to lines which have a direct physical connection" (RR App. 18); and that "an imposing number of state cases can be cited to support the proposition that the adjective 'connecting' requires a direct physical connection"[2] (RR App. 19). Similarly, the ICC argues that the requirement of reasonable interchange facilities in § 3(2) "obviously relates to interchanging traffic with physically connecting lines" (ICC 22); that "the framers of the statutory language [in § 3(4)] had actual physical connection between complainant and defendant in mind" (ICC 9); that the framers of § 3(4) "had in mind a direct physical connection" (ICC 12); and that "the only specific explanation of Section 3(4)'s prohibition of rate discrimination is

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[2] The railroad appellees' "imposing number of state cases" turn out to be of no help whatever. These cases either say that a line which physically connects is indeed a "connecting line"—a proposition that no one disputes—or they support our position that "connecting line" goes beyond physical connections. For example, Article 4536 of the Texas Revised Statutes, which the court was interpreting in *Texas & N. O. R. R.* v. *Gulf & I. Ry.*, 54 S.W. 1031 (Tex. Civ. App. 1899), read: "Whenever any two or more railroads doing business in this state shall connect with each other by crossing each other's tracks or otherwise so as to form a continuous or connected line from one point in this state to another point in this state, such lines so crossing are hereby declared to be connecting lines * * *."

that it is based upon the principle of the Pacific Railroad Acts which applied to railroads which were intended to, and did in fact, connect physically" (ICC 23).

We have shown, of course, that this interpretation requiring a direct physical connection is totally erroneous—that cases prior to the Act did not require it, that this Court has never required it, and that the ICC itself has never required it (see Brief for Appellants 28-29, 37, 43-54).

But even more importantly, the appellees proceed in their briefs in this very case to concede that a direct physical connection is *not* necessary—despite what they say the Act originally meant.[3] They agree, as the ICC put it, that the connection can be "physical or business" (ICC 13-14), or, as the railroad appellees put it, that there can be "either a direct physical connection or a business connection" (RR App. 39).

Several points should be noted. First, the only difference between appellants and appellees in regard to § 3(4) turns out to be whether the discriminating carrier is going to be responsible for establishing the "business connection," or whether this connection is going to be established by the facts of competition. Thus, the appellees would say that a carrier can grant favorable rates to one line and not to a competing line *unless* (a) the competing line happens to be physically connected to the discriminating carrier, or (b) the discriminating carrier itself has chosen in the past to

[3] The ICC concedes, for example, that both *Atlantic Coast Line* and *Chicago, I. & L. R.R.* held that a direct physical connection is not necessary (ICC 33, 36). The railroad appellees agree that *Atlantic Coast Line* so held but argue that *Chicago, I. & L. R.R.* is irrelevant (RR App. 24, 28-30).

grant the same favorable rates to the competing line or has otherwise chosen to open "through routes" with it. If either of these alternatives has occurred, appellees would concede that the disfavored line is a "connecting line" with the discriminating carrier. But absent the circumstance of physical connection, appellees would leave to the discriminating carrier the decision as to whether another line connects with it within the meaning of § 3(4).

We say that this was not the intent of Congress and is not the lesson of prior case law. We say that discrimination is to be determined by the facts of competitive life and that once it is established, it must be erased, no matter what form it takes. We say that Congress never intended to leave to the discriminating carrier the decision as to whether its own discrimination is legal or illegal—that is, whether within the Act or not. To put it in terms of this very case, if Southern Pacific and Western Pacific really do compete; if Western Pacific is part of a route that was constructed and maintained for the very purpose of competing with the Southern Pacific route; if appellees grant favored rates at a common interchange to the Southern Pacific and not to the competing route of which Western Pacific is an integral part; if Western Pacific is harmed by this discriminatory treatment —then we say that Western Pacific is a connecting line and that the discriminatory treatment is outlawed, assuming the existence of substantially similar circumstances between the two competing routes. And it should be noted here that appellees do *not* dispute any of these underlying facts. They do not in any way dispute the existing competition. The railroad appellees, in fact, refer to "the vigorous rail competition

which presently exists in this area between the Bieber route partners, on the one hand, and the Southern Pacific route partners on the other" (RR App. 9). None of the appellees questions the original purpose behind the construction of the Bieber route.[4] They do not dispute the fact that the joint rates granted to Southern Pacific are not granted to the Bieber route. And it should be emphasized that they do not dispute anywhere in their briefs the extent of the injury to Western Pacific. Therefore, the only real quarrel between the parties is as to the law—whether our definition or theirs comports with the Act.

The second point to be noted is this: as soon as appellees agree that a physical connection is not necessary, they are in no position to argue that appellants have evolved a "unique" definition of § 3(4) that would make every railroad in the country the connecting line of every other. For the fact is that every railroad is no more the connecting line of every other under appellants' definition than it would be under appellees'. To use the ICC's own illustration (ICC 14), if a western railroad chose to enter into a full set of joint rates with lines reaching all the way to the New Haven in New York City, the western railroad would be a connecting line of the New Haven under appellees' own definition of § 3(4). As the railroad appellees themselves put it, the ICC and District Court construction of § 3(4) (and their own) would include "any line *regardless of where situated* if it participates in through routes with the appellees"

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[4] The ICC, for example, says that "admittedly, a purpose of the Commission [in sanctioning the construction which created the Bieber route] was to authorize competitive rail service from California to the north" (ICC 38).

(RR App. 39; emphasis added). Thus, even under appellees' construction of § 3(4), every railroad in the country *could be* the connecting line of every other.

But in truth, this entire argument about all-embracive, unlimited connecting-line status has little to do with reality. It stands on one of those hypotheticals commonly used to make the Court fear the outcome of its decisions. In truth, the recognition of connecting-line status is only the first step in any determination of whether favored rates must be eliminated. Even if lines are connecting, there must be substantial equality of circumstances and conditions before lines must be granted the same treatment. Or to put it another way, rates can be different if conditions and circumstances (such as unduly circuitous routes) legitimately account for the rate differential. Of course, we agree with the United States that in this case, the facts of competition virtually speak for themselves, that the two competing routes are obviously similar, and that the shippers who seek to use either or both routes should have that opportunity. But the fact remains that the requirement of similarity of circumstances provides a wholly adequate safeguard against any such possibility as that posed by appellees, where rates are equalized willy-nilly across the country.

Let us be precise about what we are seeking. It is not any new, unique or impractical interpretation. It is, instead, an interpretation completely in accord with the Congressional purpose and *stare decisis*. When a carrier is granting favored rates to one or more lines making up one route and refusing to grant such rates at a common interchange to one or more lines making up a second, competing route, we contend that two questions must be answered.

First, since § 3(4) prohibits rate discrimination between "connecting lines," is the complaining line a connecting line of the discriminating carrier? It is such a line, we say, if it is an integral part of an identified route which competes with and generally parallels the favored route and which meets the discriminating carrier at a common interchange with the favored route. Western Pacific is an integral part of a route which not only competes with and generally parallels the favored Southern Pacific route but was built and maintained for that very purpose. And the Bieber route joins the appellees at the common interchange point of Portland.

If—and only if—the complaining line is found to be a connecting line, then an entirely different and separate question arises: Are the favored and disfavored lines sufficiently similar so that equal treatment is required, or are their dissimilarities so great as to legitimately account for the rate differential? Here again, we submit that the Bieber-route-Southern-Pacific-route situation is so unique that the question is virtually answered without further proof, for the entire history of these routes, and the shipper testimony in this record, clearly establish that discriminatory rates are the only obstacle to full competition on an equal basis. But if further proof is needed, it is provided in the analysis of similar circumstances and conditions on pages 64-73 of our main brief.

In summary, there is the right to complain and the right to prevail. The right to complain depends on connecting-line status. The right to prevail depends upon similarity of circumstances. If these two rights are properly invoked, there is no danger whatever of any mass application by carriers for equal treatment.

What routes traverse this country and meet these tests? What regional routes? And if there are such routes, what conceivable harm is there in eliminating the excess rates which discriminate between them? Is that not what Congress had in mind in enacting § 3(4)?

Appellees have failed to offer answers to any of these questions.

Throughout their briefs, for example, appellees again and again treat this case as if it were one in which appellants are seeking *to establish new routes.*[5] Most of their argument and citations are grounded on this proposition. But appellants are not seeking new routes. That part of the complaint which sought the establishment of new routes under § 1(4) of the Act is no longer part of the case—not because of any concession or weakness, but because § 3(4) is the direct and complete answer to the discrimination being prac-

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[5] The ICC, for example, says that Western Pacific sought to have the ICC "order the opening of a new through route" (ICC 5), refers again to this "new through route" (*ibid.*), and quotes extensively from a case that did not even mention § 3(4) or discrimination but instead dealt entirely with the establishment of new routes (ICC 12-13). The railroad appellees refer to "the sought through routes" (RR App. 6) and assert that "Railroads are not required to establish routes and rates via all possible gateways and junctions" (citing a case that did not even mention § 3(4)) (RR App. 8); that Western Pacific seeks "the establishment of such additional routes" (RR App. 9); that "the duty of a carrier to establish reasonable through routes does not require it to establish routes and rates via all possible gateways and junctions" (RR App. 12); that our definition would allow any railroad to invoke § 3(4) "regardless of the need for the establishment of additional routes" under §§ 1(4) and 15(3) (RR App. 37), and that Western Pacific did not previously contend that appellees "would be required to establish through routes and joint rates with it via Bieber and Portland" (RR App. 42).

ticed.[6] Appellees, by pretending that new through routes are being sought, have chosen to ignore that part of the complaint which prayed that they be ordered to "cease and desist" from violating both § 3(4) and the National Transportation Policy, and that they put in force "nondiscriminatory" rates (R. 7-8).

We repeat, we are not seeking new routes in this case. The Bieber route is presently in existence and has been for over 30 years. It is a viable route that is attempting to compete on an equal basis with the generally-paralleling Southern Pacific route. What we seek is not a new route but the cessation of discriminatory rates. As we pointed out in our main brief (pp. 57-58), this can be accomplished by the railroad appellees in any one of a number of ways. As we also pointed out (*ibid.*), the argument that putting a stop to discrimination would force the establishment of new through routes has been made time and again to this Court and has repeatedly been rejected. The appellees, having chosen to grant favored rate treatment to Southern Pacific, must now eliminate their discrimination and restore the competitive balance. Whether the public interest requires the establishment of "new through routes" under other sections of the Act is wholly beside the point.

The railroad appellees allege a "conflict" between Western Pacific and the United States in regard to our definitions of connecting-line status (RR App. 14-15; see also RR App. at 32, 36, 37, 39). The ICC

[6] The Examiner correctly recognized that the entire thrust of appellants' case was under § 3(4) and that it was not necessary to reach the allegations under the other sections of the Act (R. 654).

makes no such contention and in fact assumes that Western Pacific and the United States seek the same definition (ICC 8). There is no conflict. Western Pacific has argued that "there need be only a series of connecting carriers *capable* of, and *available* for, handling through service but prevented from doing so by the discriminatory rates" (p. 48). The United States has pointed out that Western Pacific is "capable of offering through transportation with defendants but for their rate discrimination favoring the competing Southern Pacific" (p. 15) and has argued that any carrier is a connecting line "if it is part of a route which connects with the defendant and which is ready to offer through transportation in combination with the defendant" (p. 29). Both Western Pacific and the United States obviously interpret § 3(4) in precisely the same way.

The railroad appellees also contend that Western Pacific has undergone a "change of position" between the proceedings below and the proceedings in this Court (RR App. 36). Again, the ICC makes no such contention and in fact recognizes that Western Pacific's position now is the same as it was in the court below (ICC 10-11). We relied, for example, on *Atlantic Coast Line* below (R. 506), just as we do here. The sentence quoted by the railroad appellees in footnote 31 of their brief is taken completely out of context, for the subject being discussed there was the nature of the Bieber route as a single unit, and the quoted sentence was immediately followed by this stricture: "What we are saying is that the Bieber Route was established as a competing line of railroad, and it was so constructed and has been so operated as a single line of railroad" (R. 682). The Bieber route

as a unit would include, not exclude, the Santa Fe, contrary to the assertion of the ICC at page 14 (including footnote 2) of its brief.

Perhaps the most interesting parts of appellees' briefs are those which deal with *Chicago, I. & L. R.R.* v. *United States,* 270 U.S. 287 (1926).

The railroad appellees give two grounds for distinguishing that case. First, they say it arose under the 1920 Act which, unlike the present Act, contained certain language which they then proceed to quote. The quoted language makes no mention of connecting lines. Unfortunately, however, they neglect to quote the remainder of the relevant provision, which reads: "* * * and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines * * *" (41 Stat. 479). Secondly, they say that *Chicago, I. & L. R.R.* is a "switching case" and not a rate case. Again unfortunately for their position, the ICC used *rate* cases in its argument to this Court in *Chicago, I. & L. R.R.* to support the very argument that the Court then adopted in its opinion.[7] And the Court's opinion was not restricted to switching facilities but was rendered in the broadest possible language applicable to discrimination in all its forms.

Even more interesting, however, is the attempt by the ICC to distinguish *Chicago, I. & L. R.R.* It will be recalled that the discrimination in that case was practiced against a line that had no physical connec-

[7] Brief for Interstate Commerce Commission, *Chicago, I. & L. R.R.* v. *United States,* No. 150, October Term 1925, pp. 27, 29.

tion with the discriminating carriers, but each of the discriminating carriers had entered into switching arrangements with each other at their common interchange points. The ICC comes to the conclusion that the holding of the case is as follows: "the [discriminating] carriers having waived any requirement of physical connection for connecting line status as to some cannot refuse to do so for all" (ICC 37). That conclusion simply makes no sense. The discriminating carriers had no physical connection to waive in relation to each other. Moreover, even if they had, waiver simply was not the basis of the Court's decision.

The ICC also distinguishes *Chicago, I. & L. R.R.* on the ground that it is a switching case rather than a rate case, just as the railroad appellees do. Yet the ICC argues in the same brief (ICC 11) that § 3(4) cannot be interpreted our way because of that part of § 3(4) which provides for adequate interchange facilities between connecting lines. Obviously, says the ICC, the interchange must be feasible, which means some kind of physical connection. Thus, the ICC is arguing on the one hand that the interchange-facilities portion of § 3(4) inhibits the Court's construction of § 3(4) in a rate discrimination case, and on the other hand that *Chicago, I. & L. R.R.* is irrelevant to this case because it involves interchange facilities.

But surely the best example of appellees' ambivalence occurs in relation to *St. Louis S. W. Ry.* v. *United States,* 245 U.S. 136 (1917). On pages 30-31 of their brief, the railroad appellees attempt to distinguish that case from this one on the ground that *St. Louis* was a § 3(1) case and therefore irrelevant to this § 3(4) proceeding. Not three pages later (pp. 34-35), the railroad appellees are upholding the relevancy of

Thompson to the instant case on the ground that "The definition enunciated in the *Thompson* case, *supra,* affirmed the earlier definition adopted by this Court in [*St. Louis*], which did involve Section 3 as well as Section 15 of the Act." Appellees, we suggest, cannot have *St. Louis* both ways—as relevant and irrelevant at the same time.

Similarly, the railroad appellees argue that §3(4) must be considered in the light of all other sections of the Act (RR App. 11-12), and yet they attempt to distinguish one case on the ground that it "relates to issues under Section 4 of the Act which are entirely foreign to a Section 3(4) proceeding" (RR App. 58).

Our main brief deals fully and completely with the issue of similarity of circumstances. We add here only one point. The railroad appellees continue to assert (RR App. 55) that equalizing both routes south of Portland will force Northern Pacific to route Bieber traffic destined to points east of the Cascades via Auburn. Section 3(4) relief only requires the offending lines to treat both common connections equally. Southern Pacific traffic is not now moved by Northern Pacific east of the Cascades via Auburn. If Northern Pacific were to move Bieber traffic to such destinations via Auburn, that would be its own choice and would be another way, by its own actions, of continuing an act of discrimination. All we seek, and all that can be given under §3(4), is equal treatment to the traffic of both Southern Pacific and the Bieber route.

We have already dealt sufficiently in our main brief with *Atlantic Coast Line R.R.* v. *United States,* 284 U.S. 288 (1932). Appellees have not refuted our interpretation of that case. Although they discuss the

case at length, they nowhere come to grips with the fact that the route being discriminated against in that case was not even commercially open at the time of the discrimination, and therefore this Court could not possibly have referred to "through route" in the *Thompson* sense. Moreover, the Court in *Atlantic Coast Line* obviously did not intend a restrictive definition of connecting-line status. It was saying merely that here, at the very least, connecting-line status was present.

Even assuming, however, that this Court's *Atlantic Coast Line* opinion could somehow be explained away, the ICC's subsequent decision in that same case definitely cannot be. 191 I.C.C. 489 (1933). The difficulty of that subsequent opinion for appellees is shown by their inability to agree on why it is distinguishable from this case. The railroad appellees say that the Piedmont formed a direct physical connection with the Clinchfield, and that the G & F, although "an indirect connection," did participate in "a large number of through routes and rates with the Clinchfield." (App. 24.) Therefore, they say, the definition of "connecting lines" in the subsequent opinion comports with the definition they seek to establish here. It is quite true that, as the ICC's subsequent opinion stated, "in many instances the through routes in connection with the Clinchfield * * * sought by complainants are already in existence * * *" (191 I.C.C. at 499). But those were not the only routes involved. On the contrary, a large number of joint rates were sought over territories where such through routes were *not* in existence. This was pointed up at the very outset of the opinion when the ICC posed the problem at hand: "[The complainants] allege by complaint, as amended,

that defendants, *by their* failure and *refusal to permit complainants to participate* between Spartanburg, S. C., and August, Ga., *in through routes* and joint rates now maintained on traffic generally between points in southeastern territory, on the one hand, and Groups A, B, & C * * * on the other hand," violated the lease conditions (191 I.C.C. at 490; emphasis added). The ICC held that the refusal and failure also violated § 3(3) (now § 3(4)) of the Act. It ruled:

> The fact remains, however, that *through routes* and joint rates between the territories here considered are in effect over defendants' lines in connection with the Southern between Augusta and Greenwood or Spartanburg and in connection with the Seaboard Air Line between Greenwood and Bostic, and *similar routes* and rates in connection with complainants' lines between Augusta and Spartanburg are *denied* complainants. This situation clearly falls within the inhibitions of section 3(3) of the act. [191 I.C.C. at 498-499; emphasis added.]

It is instructive that the ICC does not urge the same interpretation of the ICC's subsequent *Atlantic Coast Line* opinion as do appellees. Instead, the ICC argues that in the subsequent proceeding, no one raised the question of connecting-line status, that the Piedmont was a complainant, and that since the Greenwood extension had been completed, "direct physical connections were present." (ICC 33 n. 11.)

Connecting-line status, of course, is necessarily involved in any § 3(4) case. A determination of that status is a statutory prerequisite to a finding of discrimination. Moreover, the defendants specifically stated the basic issue in the subsequent *Atlantic Coast Line* proceeding to be as follows:

> The finding of Division 3 is, therefore, that—aside from any question as to the lease conditions—if the defendants voluntarily consent to be short-hauled between Augusta and Greenwood or Spartanburg by participation in rates with other carriers, the Southern Railway, for example, section 3(3) is violated unless similar participation is accorded also to the G. & F.-P. & N. There is thus raised very directly in this case the question as to the true meaning and intent of the phrase 'discrimination between connecting lines,' as embodied in that portion of section 3(3) which provides * * *. [Petition on Behalf of Atlantic Coast Line System Lines, Defendants, for Reconsideration and Reargument before the Entire Commission, filed April 26, 1933, p. 6.]

The argument that the Piedmont, which physically connected with the Clinchfield, was a complainant in the case ignores the fact that the G & F, which had no such physical connection, was also a complainant and required connecting-line status. The Piedmont, in fact, had also been a complainant in the original proceeding, and yet this Court felt called upon to rule that "There is no warrant for limiting the meaning of 'connecting lines' to those having a direct physical connection with the Clinchfield" 284 U.S. at 293.

Similarly, when the ICC says that "direct physical connections were present" after the Greenwood extension was completed, it ignores the fact that the physical connection was with the Piedmont, not the G & F. At no time, before or after the completion of the extension, did the G & F connect physically with the discriminating carriers.

In sum, the attempts by the appellees to deal with the *Atlantic Coast Line* decisions come to nothing.

The railroad appellees argue that § 3(4) refers to discrimination against "lines" and not against "routes." This is quite true. Obviously, Congress did not want to provide even by implication that an entire route had to be damaged, or that all lines making up a route had to join in a single complaint, before the courts could enforce a remedy. The purport of § 3(4) is that a particular discrimination may be inflicted on one line more than on another, and relief may be sought by a single line. The *form* that the discrimination takes, however, may be against a route made up of several lines, as in this case. Our whole point is that Western Pacific cannot be denied relief simply because the discrimination here is practiced against the Bieber route in favor of the Southern Pacific route. Western Pacific is now receiving the *disadvantage* of the discriminatory rates just as surely as the various lines making up the Southern Pacific route are each receiving the *advantage* of such rates.

As a matter of fact, the term "connecting line" has been used by appellees to denote the collective lines of more than a single carrier. In its brief in this very case, the ICC says that in *Atlantic Coast Line,* the "P & N had a line between Spartanburg and Greenwood and the G & F proposed to build a line between Greenwood and Augusta, thereby giving the P & N and the G & F, together, *a connecting line* between Spartanburg and Augusta competing with the single line of the C & W C" (ICC 27; emphasis added). The Court will note that the ICC is here using the term "connecting line" to include two separate lines of two separate carriers that connected at one point. Elsewhere in its brief, the ICC interchangeably refers to the same set of lines as "the P & N-G & F *route* be-

tween Spartanburg and Augusta" (ICC 28; emphasis added).[8]

Finally, appellees have much to say—but little to contribute—about the legislative history of § 3(4). They assert that Senator Cullom's remarks were made at a time when the connecting-line concept was not a part of the pending bill. In the first place, we were relying on Senator Cullom principally for the proposition that discrimination was to be outlawed in all its forms—a proposition clearly established in later cases. But secondly, Senator Cullom did refer to "connecting roads" and "a connecting line," and it is thus clear that his remarks formed a basis for the bill enacted one year later. Suffice it to say on this subject that appellees have not come forward with a single line of legislative history to support their present construction of § 3(4). In fact, the main thrust of their legislative history argument seems to be that § 3(4) requires a direct physical connection—an interpretation which they themselves then proceed to repudiate.

We respectfully urge the Court to adopt a definition of connecting-line status that carries out the underlying congressional purpose, conforms with prior case

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[8] The railroad appellees, although urging that § 3(4) refers only to "lines," significantly compare entire *routes* when they discuss similarity of circumstances (RR App. 51-53).

law, and at the same time meets the rigorous demands of today's intramodal competition.

Respectfully submitted,

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